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NO. 84-547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case presents any question of important public policy?

2. Whether a review of this case would require that this Court review the entire factual record?

3. Whether the Fifth Circuit Court of Appeals correctly interpreted the substantive Texas law regarding constructive trusts?

4. Whether a decision of the Texas Supreme Court, entered after a second motion for rehearing and second suggestion for rehearing *en banc* were denied, which only peripherally relates to any issues on appeal, presents a sufficient basis for this Court to require an *en banc* rehearing of a case already reviewed twice on appeal?

5. Whether due process rights of a litigant are violated in a civil case where the adverse party continues to make an unending succession of appeals and motions designed to delay effectuation of the mandate granting a money judgment, solely designed to frustrate the intent of the court of appeals' mandate?

6. Whether the Petition is so frivolous as to warrant an award of damages against Petitioner?

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NO. 83-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.
HOME ENGINEERING, INC. and
ALAN D. WHATLEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that the Petition for a writ of certiorari to review the judgment of the U. S. Court of Appeals for the Fifth Circuit in the above entitled case, entered September 26, 1983, and reaffirmed on March 12, 1984, be denied, and that Respondents be awarded damages.

COUNTERSTATEMENT OF THE CASE

This case involves title to a nine acre lakefront tract of land located near Athens, Texas, referred to in this litigation as the "Dyckman Tract". Two other tracts, an adjoining 490 acre

tract over which passed an easement to the Dyckman Tract and a 16 acre tract located in Athens, Texas (the "LaRue Tract") also figured prominently in this case. Title to all three tracts was taken in the name of Respondent, Sentry Title Co., Inc., or in the name of another company (Home Engineering, Inc.) controlled by Respondent's sole shareholder, Alan Whatley ("Whatley"). Petitioner sought, in this action, to impose a constructive trust on the Dyckman Tract.

Petitioner was a sophisticated and experienced businessman who had known of Whatley for several years but never met him until sometime in 1969 when they first met casually. Thereafter, beginning sometime in the spring of 1970, they met several times to discuss possible land deals in the Athens, Texas area. Their discussions finally focused on the desirability of acquiring the 490 acre tract which Whatley had been negotiating to acquire for some months.[1] Whatley and his then attorney, Bill Hart, had also previously been negotiating with Dyckman to acquire the 9 acre tract.[2] Thereafter, between July 6, 1970 and July 28, 1970, Petitioner, Whatley and Hart had two meetings concerning the purchase of the Dyckman property. On about July 24, 1970, the Dyckman Tract was sold to Home Engineering, Inc., a company controlled by Whatley, for $30,500. The purchase price included a promissory note for $25,500 from Home to Dyckman.

All subsequent payments made on the Dyckman note were made by Home and the property was rendered for ad valorem property tax purposes by Home. Whatley or his companies were also the makers of the promissory notes given for the other two properties.

After Home encountered financial difficulties, the Dyckman Tract was foreclosed upon and Petitioner asserted a constructive trust on the proceeds from that foreclosure, claiming that Respondent was purchasing the Dyckman Tract (and

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[1] *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 944 (5th Cir. 1983) (hereinafter referred to as *Sentry I*).

[2] Findings of Fact and Conclusion of Law, Findings of Fact No. 19.

the other properties) for Petitioner's benefit. Ward, contending that Respondent Whatley and his companies had acquired the properties for Ward's benefit, confronted Whatley at Whatley's office. After an altercation, Ward promised that he would make Whatley "sorry" for having become involved in these deals.[3]

Throughout the proceedings in the trial court and court of appeals, and in the course of the previous petition to this Court,[4] Petitioner contended that "a confidential or trust relationship between Ward and Whatley existed previously to and apart from the acquisition of the Dyckman 9 acres, sufficient to impose a constructive trust."[5] Otherwise, the Texas Statute of Frauds and Texas Trust Act would clearly have foreclosed Ward's claim. That argument having been rejected four times by the Fifth Circuit (twice in published opinions and twice in refusals to grant motions for rehearing or suggested rehearings *en banc)*, and certiorari having been previously denied on the same basis raised by this Petition, Ward now seeks to again attempt to persuade this Court that the Fifth Circuit misapplied Texas law to the somewhat complicated facts in this case, and argues that a recent decision of the Texas Supreme Court restates the law of the State of Texas in such a way as to allow imposition of a constructive trust in Ward's favor.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Questions Of Important Public Policy and Would Require This Court To Sift Through The Entire Factual Record To Review The Fifth Circuit's Decision.

Petitioner, for the second time in this Court, alleges that the Fifth Circuit violated the *Erie*[6] doctrine in failing to apply

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[3] Trial transcript p. 612.

[4] The previous Petition for Writ of Certiorari to this Court, which was denied was No. 83-1581.

[5] Post-Trial Brief of Defendant Travis Ward, pp. 2-3; Brief of Appellee p. 34; Supplemental Brief of Appellee, pp. 3-6.

[6] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Texas substantive law to Petitioner's constructive trust claims. As was previously noted by Respondent, Petitioner's discussion of *Erie* is, at best, misplaced. It has never been disputed that Texas substantive law governs this action. Indeed, the entirety of the discussion of case law found in the decisions by the Fifth Circuit are based upon Texas cases. Respondent would submit that the Court of Appeals clearly recognize this requirement[7] and correctly interpreted the controlling Texas law and applied it to the facts in this case. In truth, Petitioner does not claim an *Erie* violation but simply quarrels with the result of the Fifth Circuit's application of Texas law to the facts of this case. Petitioner's arguments have now been presented four times to the Fifth Circuit and have been rejected on each occasion.[8]

The only thing which has changed in the time which has passed since Ward last filed a Petition For Writ of Certiorari in this Court is that the Texas Supreme Court has entered a decision in the case styled *Ginther v. Taub*.[9] However, as will be further discussed *infra*, the only relationship between *Ginther v. Taub* and the instant case is that both happen to involve issues of constructive trust. The factual backgrounds of these cases are so completely divergent that a mere reading of *Ginther* makes it clear that the case has absolutely no applicability to the facts of the instant case.

More importantly, while Petitioner claims that there is a conflict between the decisions of the Fifth Circuit in this case and prior decisions of the Fifth Circuit, and between the decisions of the Fifth Circuit in this case and previous decisions of the Texas Supreme Court, a review of the factual

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[7] *Sentry I, supra* at 945 and *Harris v. Sentry Title Co., Inc.*, 727 F.2d 1368, 1370 (5th Cir. 1984) (hereinafter "Sentry II").

[8] Following the initial appellate decision (Sentry I), Petitioner sought a Rehearing with a Suggested Rehear...g *en banc*, which was denied. Petitioner, supported by amicus, then filed a Motion to Recall the Mandate which was granted. Thereafter, the Fifth Circuit, in all important particulars, expanded on and reaffirmed its earlier decision (Sentry II). Petitioner then filed another petition for rehearing and another suggested rehearing, *en banc*, which were subsequently denied.

[9] 27 Tex. Sup.Ct.J. 488 (1984); Petition For A Writ of Certiorari, p. 3.

background of the cases cited by Petitioner in support of his position with the factual background of this case makes it clear that no such conflict exists.

As can be seen from the truncated statements of the case contained in the Petition and in this response, as well as the far more detailed statements reflected in the two opinions of the court of appeals, a determination of merits of this case is highly depended upon a full appreciation of the entire factual record developed in the trial. Both decisions of the court of appeals reflect an intimate intertwining of the facts of the case (those specifically found by the trial court and those which are undisputedly in the trial record) with prior case law of Texas. Petitioner simply remains dissatisfied with the outcome of that exercise.

Put another way, the Petitioner merely requests that this Court grant a writ of certiorari to review the full evidentiary record and inferences that might be drawn and substitute its judgment of the facts for that reflected in the two appeals court opinions. This does not form a sufficient basis for issuance of a writ of certiorari.[10]

The petition, when stripped of its excess verbiage, presents the question of whether there is sufficient evidence of a substantial and long-term confidential relationship between two business associates to support imposition of a constructive trust on real property, title to which is held by one. This is just the type of factual inquiry into which this Court has repeatedly declined to engage.[11]

After arguing that the Fifth Circuit has somehow violated the *Erie* doctrine by failing to properly apply Texas case law to the facts at hand, Petitioner anomalously continues to argue that this Court should look to its previous decisions in *Robertson v. Chapman*, 152 U.S. 673 (1894) and *Moore v. Crawford*, 130

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[10] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

[11] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

U.S. 122 (1889) for guidance in determining the criteria for imposition of constructive trust.[12] Of course such reliance is misplaced. Both of those cases were pre-*Erie* cases and therefore no longer have any applicability whatsoever to a determination of the criteria which might have evolved from the Texas case law in the area of constructive trusts. It is only to the Texas cases setting forth the criteria for imposition of a constructive trust and, in one instance, a Fifth Circuit case so interpreting the Texas decisions, that this Court should turn in determining the appropriate standards.

Petitioner's argument that "where a *federal court's determination* of a state law issue is *diametrically opposed* to the decisions of a *state's highest court* on that exact issue, this Court has granted certiorari. . . "[13], is certainly a correct exposition. And certainly Respondents would not argue to the contrary. However, there is absolutely nothing in this case to suggest the Fifth Circuit's decisions are in anyway contrary to Texas state law, much less diametrically opposed to decisions of the highest court of the State of Texas. Indeed, a review of the Fifth Circuit opinions makes it clear that the Fifth Circuit was conscientious in its application of the decisions of the Texas courts in arriving at its conclusions.

Petitioner's reliance upon his Appendix E, a spread sheet allegedly comparing the basis for prior constructive trust cases arising under Texas law with the pertinent facts of the instant case is interesting. However, it is also inaccurate and misleading. Petitioner conveniently fails to point out the "pertinent facts" which significantly distinguish Petitioner's cases from the factual situation present in the instant case. It is those distinguishing characteristics of the previous case law which make it clear that there has been no violation of the *Erie* doctrine. The Fifth Circuit properly analized the previous cases and found that based upon the standards enunciated therein that there was an insufficient basis for imposition of a constructive trust.

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[12] Petition at p. 6.

[13] *Id.* at p. 7.

Where there is no conflict between the circuit court's decision and the decisions of the relevant state's highest court, there is no violation of *Erie,* and therefore the doctrine set forth in *West v. A.T.&T. Co.,* 311 U.S. 223, 235 (1940), relied upon by Petitioner, is inapplicable.

Apart from his argument that the Fifth Circuit decisions are contrary to applicable Texas case law, Petitioner cites no support whatsoever for his contention that the decision in the instant case in anyway "presents the court with judicial as well as legal policy questions of exceptional public importance."[14]

II. The Decisions of the Fifth Circuit In This Case Correctly Interpret the Substantive Texas Law Regarding Constructive Trusts.

As previously noted by Respondents, Texas law requires that a contract to convey real property be in writing to be enforceable. Tex. Bus. & Com. Code Ann. § 26.01 (Vernon 1968). The Texas Trust Act, Art. 7525b-1 V.R.C.S., as then in effect, provided that no trust may be established except by written instrument. Petitioner's claims clearly fall within the provisions of these Statutes of Frauds, and unless an exception can be found, Petitioner's claims are unenforceable. In his Petition, as well as in his briefs filed in the lower courts, Ward has completely ignored these laws and their purposes. As noted by the Fifth Circuit

> There is a noticeable lack of discussion of the Statute of Frauds and its purpose in the briefs of appellees on this issue. We recognize that each case under Texas law turns upon its own facts. The facts were established and found by the district court, but under those facts the requisites to the establishment of the constructive trust in Texas law were not met. *Sentry* II at 1370.

Texas courts have long recognized and resorted to the device of constructive trusts to remedy wrongs committed by one who has occupied a long standing position of trust and

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[14] *Id.* at p. 6.

confidence and who would otherwise be unjustly enriched.[15] However, the mere incantation "constructive trust" does not abrogate the efficacy of the statute of frauds. Rather, it sets the court on a searching factual inquiry to determine whether there has been a long standing relationship of trust and confidence prior to and separate from that transaction in which a constructive trust is sought.[16] The relationship must be sufficient to give rise to a foundation for believing that one need not look out for one's own affairs—trusting that the other person will act only in the confider's best interest *and* there must be a showing that the party breaching that trust will be thereby unjustly enriched.[17]

Petitioner now relies upon only three decisions of the Texas Supreme Court in claiming error by the Fifth Circuit: *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977), *Huffington v. Upchurch,* 532 S.W.2d 576 (Tex. 1976); and *Ginther v. Taub,* 27 Tex. Sup.Ct.J. 488 (1984). In addition, Petitioner also relies on *Palmer v. Fuqua,* 641 F.2d 1146 (5th Cir. 1981), a case involving imposition of a constructive trust arising under Texas law. It is important to note that the Fifth Circuit was aware of the fact that the *Ginther* decision was on appeal to the Texas Supreme Court at the time the Fifth Circuit rendered its second opinion. Indeed, Petitioner, in his second motion for rehearing and in his second suggestion for rehearing *en banc,* attached copies of the Texas Supreme Court argument of the appellant in *Ginther* who was urging imposition of a constructive trust. Apart from the fact that *Ginther* involved *pleadings* and factual *findings* of fraud by an attorney on his client (obviously a major distinguishing characteristic from the instant case), there are other major distinguishing characteristics which make the *Ginther* decision totally inapplicable to the facts of the case at hand.

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[15] *See Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977); *Meadows v. Bierschwale,* 516 S.W.2d 125 (Tex. 1974); *Tyra v. Woodson,* 495 S.W.2d 211 (Tex. 1973).

[16] *Sentry I* at 946; *See also, Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333, 336 (Tex. 1966).

[17] *Rankin v. Naftalis, 557 S.W.2d 940, at 944.*

A brief restatement of the relevant facts of the instant case and a comparison of those *facts* with the facts of the cases relied upon by Petitioner will highlight the insubstantiality of Petitioner's position.

In the instant case the parties were casual business acquaintances at the time of the transaction in question. At most they had met two or three times to discuss the transaction which became the subject matter of this litigation.[18] The Petitioner and Respondent Whatley were both sophisticated businessmen who had clearly engaged in numerous transactions involving land and were thus aware of the Texas Statute of Frauds and Texas Trust Act requirements. Petitioner had the advantage of reliance upon the advice of counsel at every step of the way of the proceedings leading up to the transaction which became the subject matter of this lawsuit.[19] Prior to the transaction which became the subject matter of this lawsuit Petitioner and Respondent Whatley had engaged in no other business activities together whatsoever. There was no written document evidencing any relationship whatsoever between Petitioner and Respondents in this case.

In *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977), a case which figures prominently in Ward's Petition, there was a prior business relationship between the parties which was reflected by a written contract drawn up by the attorney for the party against whom a constructive trust was sought to be imposed. The contract was for the joint acquisition and development of oil and gas leases in the same geographical area and in which the drilling objective was the same as that on which a constructive trust was sought. The plaintiffs, seeking imposition of a constructive trust, alleged that the defendant had told them that he would acquire the lease which became the subject matter of the litigation for all of the parties jointly. However, after a

[18] Findings of Fact and Conclusions of Law, Finding of Fact No. 19.

[19] His attorney, close personal friend and confidante, Willis Moore, attended most of the meetings between Petitioner and Whatley.

falling out between the plaintiffs and defendant, it came to light that the defendant had acquired the lease solely in his own name. Plaintiffs sued to impose a constructive trust upon the lease after learning that it was productive. The trial court ordered that the plaintiffs take nothing by way of their action. Plaintiffs appealed and the decision of the district court was reversed. Defendants then appealed to the Texas Supreme Court, alleging that the plaintiffs were merely trying to impose an oral trust on the properties in question and that to do so would violate both the Texas Trust Act and the Texas Statute of Frauds. Petitioner Ward failed to point out that the Texas Supreme Court *refused* to impose a constructive trust, reversed the intermediate appellate court's decision and reinstated the trial court's judgment that the plaintiffs take nothing.

The Supreme Court recognized that "there must be strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer" in order to impose a constructive trust. *Id.* at 944. However the court went on to note that a constructive trust:

> . . . must be used with caution, especially where as here proof of the wrongful act rests in parol, in order that it may not defeat the purposes of the statute of wills, the statute of descent and distribution, or the statute of frauds." *Pope v. Garrett,* 147 Tex. 18, 211 S.W. 559, 562 (1948). Subjective trust, cordiality and the trust which prevails between businessmen which is the foundation of ordinary contract law, affords no basis for the imposition of an oral trust and thwarts the statute of frauds. *Thigpen v. Locke,* 363 S.W.2d 247 (Tex. 1962). *Id.*

The court noted that the relationship between the plaintiffs and the defendant in *Rankin* did not rise to the level of a technical fiduciary relationship, such as would be the case with an executor, administrator, guardian, attorney or partner. *Id.* While the defendant in *Rankin* was contractually bound to make an assignment to the plaintiffs of their respective interests in the initial leased area and to drill wells on the initial leased area and then operate those wells for the benefit of both the

plaintiffs and defendant, the court found that the defendant was not a fiduciary except to the extent of their relationship in connection with the initial leased property. In short, the defendant's fiduciary duties did not extend beyond their dealings within the scope of the underlying relationship with respect to the initial leased property.

> The Texas Legislature on successive occasions from the early days of the Republic has expressed its intent that contracts concerning lands must not, as Lord Coke expressed it, "be left to slippery memory" but must be reduced to writing. The purposes served by and the reasons for the Statute of Frauds, Tex. Rev.Civ.Stat.Ann. Art. 3995 and the Texas Trust Act, Tex.Rev.Civ.Stat.Ann. Art. 7425b-7, are reiterated in *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex. 1966), and earlier by *Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559, 562 (Tex. 1948). *Id.* at 943-4.

Perhaps Petitioner could find more solace in the Texas cases on which he has relied which did uphold imposition of a constructive trust. However, in *Huffington v. Upchurch,* 532 S.W.2d 576 (Tex. 1976), the parties entered into a written partnership agreement, signed by both parties, which defined the purposes of the partnership to include the acquisition development operation of oil, gas and mineral leases. Furthermore, the partnership agreement specifically stated that the parties were free to conduct ". . . any other business transaction not directly related to the business of acquiring mineral leases and other mineral or royalty interest and the exploration for and production of oil, gas and other minerals." *Id.* at 578. Sometime thereafter the managing partner, Huffington, took an interest in an Indonesian oil and gas venture which proved to be highly successful. One of the partners who was closed out of the Indonesian transaction sued, seeking to impose a constructive trust upon a pro rata share of the profits of the Indonesian venture. In light of the facts recited above, the Texas Supreme Court held that there was a sufficient basis for the trial court to impose such a constructive trust.

It is important to note that Huffington and Upchurch were "business acquaintenances and friends of long standing."[20] Huffington, through his wholly owned corporation, employed Upchurch for a number of years to act as a land man in finding attractive oil and gas leases. Following several years of employment, the parties entered into the *written* partnership agreement described above which was in effect in 1965 and which was renewed *in writing* for the years 1966, 1967 and 1968. During those years Upchurch continued to find attractive leases which Huffington promoted. It was during the year 1968 that Huffington participated in the Indonesian venture in which Upchurch sought imposition of a constructive trust, alleging breach of fiduciary relationship, fraud, conspiracy to defraud, and breach of trust.

While the original partnership agreement between the parties in *Huffington* may have only envisioned their joint participation in oil and gas transactions in the United States, that agreement itself did not so limit their geographic area of interest. In fact, it specifically covered *all* oil and gas lease transactions. It specified that the parties could engage in other kinds of transactions which did not encompass oil, gas and mineral development. Thus, while the Indonesian transaction was geographically outside the area covered by the prior transactions between Huffington and Upchurch, it was clearly within the parameters of the written contract between the parties.

Those facts should be contrasted with the facts of the instant case. Here there were no prior transactions between the Petitioner and Respondents before the transactions which gave rise to the instant action. Neither was there a distinction between the transaction to acquire the 490 acres and the transaction to acquire the Dyckman 9 acres. Indeed, as noted

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[20] *Huffington v. Upchurch*, 523 S.W.2d 44, 46 (Tex. Civ. App.—Houston 1975), this is the report of the Court of Civil Appeals decision which was, in all essential elements, affirmed in the Supreme Court opinion relied upon by Petitioner and cited above.

by the circuit court, "It is of compelling significance in this case that the dealings between Ward and Whatley were not prior, unrelated dealings in real property. Rather, they were all part of a single master plan to acquire the 490 acres." *Sentry I* at 948. Ward and Whatley had no business dealings with each other prior to the arrangements to acquire the 490 acres. In *Huffington* there were obviously numerous business dealings between Huffington and Upchurch prior to the Indonesian transaction.

Neither was the acquisition of the Dyckman tract independent from the acquisition of the 490 acres. Again as noted by the circuit court:

> . . . it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. * * * However, no matter how intertwined the parties financial scheming might have been during that period (early 1970), a 6 month old plan to acquire properties does not meet the kind of ongoing, confidential relationship required under Texas law to import imposition of a constructive trust. *Id.*

Thus, not only is there no writing which sets forth the nature of the relationship between the parties in the instant case as was true in *Huffington,* but there was no history of prior similar transactions between the parties as there was in *Huffington,* nor is there any evidence of a defined scope of mutual interest as there was in *Huffington.* In short, there is virtually no similarity between the factual basis relied upon by the court in imposing a constructive trust in *Huffington* and the facts in the instant case. Indeed, the only Texas cases where a constructive trust has been imposed without a requirement of a long standing fiduciary relationship have been those in which there has been explicit *pleadings and findings of fraud.* See, e.g., *Meadows v. Bierschwale,* 516 S.W.2d 125 (Tex. 1974).

We may then turn to the only other Texas case relied upon by Petitioner, the recent Supreme Court decision in *Ginther v. Taub,* 27 Tex. Sup.Ct.J. 488 (1984). As noted, the Fifth Circuit

was fully aware of the status of that case at the time of its most recent decisions. Indeed, *Ginther* has been in litigation since at least 1977[21], almost as long as this case.

Significantly absent from Petitioner's discussion of *Ginther* is the fact that the jury found that the attorney for the party upon whom a constructive trust was sought to be imposed (Taub) had fraudulently induced the plaintiff (Ginther) to execute an assignment by which Taub obtained title to the property on which the constructive trust was sought. The jury further found that Taub knowingly participated in his attorney's breach of the attorney's fiduciary relationship with Ginther. On this basis, the Supreme Court stated: "We hold the jury findings of fraud by MacNaughton to benefit Taub support the imposition of the constructive trust remedy." *Id.* at 490. Furthermore, conspicuous by its absence from Petitioner's discussion of *Ginther* is the fact that Ginther and Taub ". . . had several long-standing similar relationships involving pre-existing Exxon-type deals. All parties fully understood what an 'Exxon-type deal' meant." *Id.* at 489. And, of course, the agreement involving the lease on which a constructive trust was sought to be imposed was an "Exxon deal". Thus, unlike the relationship between Petitioner and Respondents, the parties in *Ginther* had a long-standing relationship involving similar type transactions, and the transaction which was the subject matter of the *Ginther* suit was of the same general nature as the previous transactions. And, unlike the instant case, there were specific *pleadings and findings of fraud.* In short, there is absolutely nothing in the opinion in *Ginther* to suggest that the Fifth Circuit erred in its opinions in this case in any way.

The one non-Texas state court case cited by Petitioner which might have any relevance is that of *Palmer v. Fuqua,* [22] a Fifth Circuit case which was cited by Petitioner in his first Petition For a Writ of Certiorari and which was fully argued to the Fifth Circuit. Petitioner continues to claim that the Fifth

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[21] *Ginther v. Taub,* 570 S.W.2d 516, 518 (Tex. Civ. App. Waco 1978, writ ref'd n.r.e.), the original Court of Civil Appeals opinion.

[22] 641 F.2d 1146 (5th Cir. 1981).

Circuit's decisions in the instant case are in conflict with *Palmer*. A reading of the facts of *Palmer* once again reveals that Petitioner's position is not supportable. In *Palmer*, as in *Huffington* and *Rankin, supra,* there was a written partnership agreement which defined the relationship between the parties. And like *Huffington, Palmer* involved a transaction in which the managing partner took advantage of an opportunity which should have been presented to the partnership under the terms of the written partnership agreement itself.

The *Palmer* court found that the subsequently acquired lease was clearly within the "area of interest" defined in the written partnership agreement and that the general partner's acquisition of the lease without giving the partnership the opportunity to participate constituted a breach of the general partner's fiduciary duty to the partnership. As noted by the Court, "partners, as a matter of law, stand in a fiduciary relationship to one another.", citing *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962). The Fifth Circuit distinguished *Rankin,* 557 S.W.2d 945-46, as involving a "joint venture limited to development of only one lease". *Id.* at 945. The court further distinguished the earlier case of *Bolin v. Smith,* 261 S.W.2d 352 (Tex. Civ. App.—Ft. Worth 1953, *aff'd in part and rev'd in part, Smith v. Bolin,* 271 S.W.2d 93 (Tex. 1954). There the court had held that in spite of certain broad language of purpose in a written partnership agreement, the parties had impliedly limited the scope of their enterprise to a single set of leases only and that therefore later transactions were not subject to the terms of the partnership agreement. Rather, the *Palmer* court found that its facts were "good deal more similar to *Huffington* than to *Bolin.*" The court relied upon the previously noted very broad statement of purposes in *Huffington* pursuant to which the parties had engaged in a number of transactions over a period of years. Furthermore, in *Palmer* and *Huffington* the agreement specifically designated the types of ventures in which the partner could engage without breaching his fiduciary duty to the other. The court went on to note

that the agreement included a broad general statement of purposes that indicated that the parties did not intend to limit their enterprise to the properties specifically listed in the agreement but intended to acquire and operate other properties in the defined area of interest, and that the general partner's acquisition of such a property without giving the partnership the opportunity to participate therein constituted a clear breach of his fiduciary duty to the other partners.

Thus, there is no conflict between the decision in *Palmer* and the *Sentry* decisions. There was a clearly defined pre-existing fiduciary relationship between the parties in *Palmer*. The transaction on which a constructive trust was sought to be imposed was of a similar nature to that defined in the formal agreement. In the instant case there were no preexisting relationships between the parties, much less a written agreement by which the rights and obligations of the parties could be measured. Therefore there is no internal conflict between the Fifth Circuit decisions.

Petitioner conveniently ignores the decision in *Consolidated Gas & Equipment Co.*,[23] which is clearly a leading Texas Supreme Court decision dealing with the imposition of a constructive trust where there is no written agreement between the parties. As stated in *Consolidated Gas*, a cornerstone for the constructive theory is that "there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit." The court there noted that a prior existing relationship could give rise to a fiduciary obligation "when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." *Id.* at 337.

Petitioner continues to be somewhat confused by the requirement that there be a prior relationship separate from the transaction in which a constructive trust is sought to be imposed while also requiring that the transaction in which the constructive trust is sought to be imposed be "within the scope of the

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[23] 405 S.W.2d 333 (Tex. 1966).

parties prior dealings." As noted in Respondent's previous brief in this Court, this merely means that the prior dealings between the parties must be completely separate from the subject transaction (a requirement met in each of the case cited by Petitioner), and that the transaction in which the constructive trust is being sought be similar in nature to the previous transactions between the parties (another standard met in every one of the cases in which a constructive trust was imposed relied upon by Petitioner). A single continuous transaction or plan will not suffice to form such a fiduciary relationship in the absence of a formal or technical relationship such as that of an attorney, partner, or trustee. See *Rankin, supra.*

> For a constructive trust to arise there must be a fiduciary relationship before and apart from the agreement made the basis of the suit. Such is our holding here. As stated, the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless. *Consolidated Gas* at 336.

There was not the type of long standing relationship between Petitioner and Respondents sufficient to impose a constructive trust absent a written contractual agreement or technical fiduciary relationship. Prior to 1970, they had met only once. Furthermore, the transactions involving the Dyckman property and the 490 acres were, as noted, so closely related as to be characterized as part of the same transaction.

Again, as noted in Petitioner's previous response, the facts in *Consolidated Gas* are virtually identical to those in the instant case. In *Consolidated Gas* the Texas Supreme Court reversed the trial court's imposition of a constructive trust and held that:

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship. *Thigpen v. Locke, supra.* That opinion reasoned that "[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality * * *." The dissent in Thigpen recognized that fact; but took the view that over the long period of years, a relationship of financial advisor

> and confidante had arisen between a trust officer of a bank and his friend, a customer of the bank, which raised an issue of fact as to a confidential relationship.
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> • • •
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> This Court in *Gaines v. Hamman, supra,* as well as in *Thigpen v. Locke, supra,* recognized that a fiduciary relationship could arise outside of those relationships listed above when, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced. The proof in this case simply does not show such a relationship of the parties as to come within the exceptions recognized in the *Gaines* and *Thigpen* opinions. There is no constructive trust. 405 S.W.2d at 336-37.

It is not the Fifth Circuit or Respondents who seek to change the law of Texas on constructive trusts. It is Petitioner. There is not a single Texas case cited by Petitioner, and none has been found by Respondent, in which a constructive trust has been imposed on business associates where there was such insubstantial evidence of a confidential or fiduciary relationship. In every case, the requisite pre-existing relationships had been in effect for a substantial period of time. For example, in *Gaines v. Hamman,* 358 S.W.2d 557 (Tex. 1962), the prior relationship spanned four years. In *MacDonald v. Follett,* 180 S.W.2d 334 (Tex. 1944), it spanned three years. In *Edwards v. Strong,* 213 S.W.2d 979 (Tex. 1948), *aff'g* 207 S.W.2d 655 (Tex. Civ. App.—Ft. Worth 1947), it existed "for some years in the past." And in Petitioner's only "new" case since the Fifth Circuit decisions and his last appeal to this Court (*Ginther*), it spanned more than five years. Petitioner is simply dissatisfied with the outcome of this case; and, as he has successfully held Respondent's money for over two and a half years, is merely attempting to delay the inevitable.

III. Petitioner, Having Exhausted All Reasonable Remedies, Is Now Pursuing Frivolous Remedies In An Attempt To Thwart The Results Of His Unsuccessful Appeals.

Petitioner states that "*there is a serious due process question raised herein* . . . ."[24] Respondents agree. While recognizing

[24] Petition at p. 26.

that all litigants are entitled to due process under the Constitution of the United States, Respondents would respectfully submit that no litigant is entitled to abuse that process to the detriment of his adversaries or the courts. A brief history of the instant litigation would show that Petitioner Travis Ward has engaged in such abuse.

This case was filed in 1975—9 long years ago—and relates to transactions which occured in 1970. The case was brought as an interpleader in Texas state district court. Among the claimants to the funds interpled in to the registry of the court were the Petitioner, the Respondents and the United States Internal Revenue Service. Because the Internal Revenue Service had a claim upon the funds in question, it was able to remove this action to federal district court. After languishing in federal district court, for a variety of reasons, from 1975 until late 1980, the district court finally entered an order in early 1981 that the case be brought to trial in April, 1981. While some previous discovery had occurred in this and in other related state court cases between Petitioner and Respondents, it was not until January, 1981 that discovery in this case commenced in earnest. On the eve of trial, in an effort to further delay this case, Petitioner filed a motion to remand the case to state district court. Finding that there was no good reason to continue to delay litigation of this matter, the district court proceeded to commence trial in April 1981.

Trial consummed approximately one week. It was not until November, 1981, that the district court finally entered its findings of fact and conclusions of law. That resulted in a judgment being entered in January, 1982. That judgment was adverse to the claims of Respondents and sustained Petitioner's claim on a constructive trust theory. The judgment denied all other relief. Respondents then appealed the decision of the district court to the Court of Appeals for the Fifth Circuit. In

September, 1983, the Fifth Circuit reversed the district court's decision, finding that there was an insufficient basis for the imposition of a constructive trust and further stating that there was no basis for the imposition of a resulting trust because the necessary elements were not present.

Petitioner then filed his first motion for a rehearing, urging that the decision reversing imposition of a constructive trust was in error and further advancing the argument that the elements necessary for imposition of a resulting trust as an alternative basis for the award of the funds to Petitioner were present and a resulting trust should have been imposed by the appellate court. Petitioner also filed his first suggestion for a rehearing *en banc*. Both the motion for rehearing and the suggested rehearing *en banc* were denied.

The Petitioner had withdrawn the funds from the registry of the court following the district court's judgment. Inasmuch as a period of some 18 months had then passed, during which Petitioners had use of Respondents' funds, Respondents believed that they were entitled to interest on the money withdrawn from the registry of the court from the date it was withdrawn until the date it was repaid to Respondents. Inasmuch as that issue had not been addressed in the mandate, Respondents sought recall of the mandate and requested that they be awarded interest by the court of appeals. At the same time Petitioner, being dissatisfied with his failure to obtain a rehearing, also sought recall of the mandate, claiming that the decision not awarding Petitioner the funds was erroneous and at the very least Petitioner should be awarded his out-of-pocket expenses. Petitioner's claims were identical to those which had been rejected by the Fifth Circuit in its first opinion and in its refusal to grant a rehearing or *en banc* rehearing.

The Fifth Circuit ordered the recall of the mandate, *reaffirmed its denial of Petitioner's claims* to the funds, and then ordered that the cause be remanded to the district court to enter a judgment in favor of Respondents, allowing Petitioner to

withhold only the amount of his out-of-pocket expenses and ordered the district court to determine what interest should be awarded to Respondents on the sums withdrawn from the registry of the court and on the sums which Petitioner was to be allowed to retain as representing his out-of-pocket expenses.

Petitioner, being dissatisfied with that result, filed his second motion for a rehearing and his second suggestion for a rehearing *en banc,* both of which contended that the denial of Petitioner's resulting trust and constructive trust claims was erroneous. Once again Petitioner's motions were denied. Petitioner also sought review by the this Court by filing his first Petition for a Writ of Certiorari, again challenging the court of appeals findings on both the constructive trust and resulting trust issues. That petition was denied. Petitioner then filed his *third* suggestion for an *en banc* rehearing, seeking to have the Fifth Circuit again review his constructive trust claims. The motion for leave to file this suggested petition for rehearing *en banc* was denied by the court in August, 1984.

The mandate issued and Petitioner then filed in the district court a Motion to Consider and Decide Resulting Trust Claim and a Motion for Relief on Remand. In those motions Petitioner alleged that the resulting trust issue had not been previously raised or considered and should therefore be relitigated, and further contended that because the Petitioner had some collateral claims pending against the Respondent Whatley in other legal actions that he ought to be allowed to hold the entirety of the funds, irrespective of any legal right that Respondents might have to the funds, until the other unrelated litigation was concluded. In an effort to further delay this litigation, Petitioner alternatively requested that the district court remand the entire case to state court for further proceedings.

The district court granted Ward's motion to consider the resulting trust claim. Respondents believe that the resulting trust claim was disposed of by the district court's previous

judgment (which denied all relief not granted), which was drafted by Ward's own attorneys. Respondents further believe that the Fifth Circuit has adequately considered and disposed of Ward's resulting trust claim which was the subject of two motions for rehearing, a suggestion for rehearing *en banc* and the prior petition for a writ of certiorari. The issue has been adequately raised, presented, brief, considered and addressed of and further litigation constitutes an attempt to relitigate a decided issue. Respondents have therefor filed a petition for a writ of mandamus, or in the alternative of prohibition, directed to the district court.

Since the inception of this case, Ward has been represented by no less than 6 different attorneys and firms. Ward was initially represented in the state and federal court litigation by the firm of Strasburger & Price of Dallas, Texas, one of the largest firms in the city. In 1980, Strasburger and Price was succeeded by Rohde, Chapman, Ford & Howe, which tried the case and handled the initial appeal to the Fifth Circuit. Rohde, Chapman continued on the case but was joined by William Dorsaneo, Professor of Law at Southern Methodist University, who authored and filed the first motion for rehearing and the first suggestion for rehearing *en banc*. When that proved to be unsuccessful, Professor Dorsaneo was followed by Professor Page Keaton, former Dean at the University of Texas School of Law, of the firm of Scott, Douglas & Keaton, who handled Petitioner's motion for recall of mandate. When that did not result in a favorable decision, Petitioner then hired the firm of Hiram C. Eastland, Jr., of Jackson, Mississippi, who filed Ward's second motion for rehearing and second suggestion for *en banc* rehearing. When that did not succeed Ward then hired James C. Coleman, retired Chief Judge of the United States Fifth Circuit, to assist in obtaining another rehearing of the matter and who is also listed as counsel on this proceeding.

At the time Ward withdrew the funds on deposit with the Clerk of the Court, in February, 1982, he received the sum of approximately $400,000. While it is impossible to estimate the

total sum which Mr. Ward has spent on attorneys' fees in the course of this case, one may safely presume that they have probably consumed the substantial portion of the funds which Mr. Ward has received. On a full hourly basis, Respondent's attorney's fees have exceeded $100,000 and Respondent has been represented by the same firm throughout the proceeding. Mr. Ward's actions have now gone beyond a mere attempt to obtain due process and constitute an abuse of process.

All of this may lead to the question of why Petitioner would go to such lengths. The trial record reveals that after Petitioner and Respondent Alan Whatley had an altercation in Mr. Whatley's office in 1973 that Mr. Ward threatened that he would get even with Mr. Whatley. He has certainly tried to do so. He has brought several actions against Whatley. He has litigated this matter beyond all reason. He had had his days and weeks and months and years in court and it is now time to put an end to this process. Mr. Ward's right to due process should not be allowed to infringe upon Respondent's correlative and equally important right to due process, which includes the right that all litigation should ultimately be brought to an end. Nine years is long enough. This is not a complicated action. It involves relatively straight-forward issues of Texas law, on which there are literally dozens of cases in which the course has been charted over the years. The Fifth Circuit Court of Appeals has had ample opportunity to consider and has properly decided the issues presented. However, even if by some chance the Fifth Circuit were wrong, that is not a basis for this litigation to be allowed to continue indefinitely. All cases must ultimately come to a conclusion and it is well past time that this one be brought to that conclusion.

The Petitioner does not raise any issues which were not previously raised in this Court. There are no new cases to be considered. Petitioner's actions are clearly designed simply to gain time. They are kinds of actions which this Court has explicitedly stated it will not tolerate. Sup. Ct. Rule 49.2 provides that this Court may award Respondents damages

when it appears that the petition is "frivolous". That rule is predicated on the power granted in 28 U.S.C. 1912. In referring to the predecessor of this section, the Court has said:

> This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find our jurisdiction has been invoked merely to gain time. *Amory v. Amory,* 1 Otto 356, 357 (1875).

The actions of Petitioner's many attorneys reflect an intention to delay this case and turn it into one which never ends. It would be indeed difficult to find a case in which it would be more appropriate to apply the Second Circuit's admonition that "We will not countenance attempts to pervert the federal judicial process into a Dickensian Court where lawsuits never end." *Overmyer v. Fidelity & Deposit Co.,* 554 F.2d 539, 543 (1977). Resondents believe that this case presents one of those rare instances in which an award of damages would be appropriate.

IV. Conclusion

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition and award Respondents damages due to Petitioner's vexatious and dilatory tactics.

Respectfully submitted,

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V. CERTIFICATE OF SERVICE

I hereby certify that on the day of October, 1984, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on the several parties hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

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I further certify that all parties required to be served have been served.

_____

J. Albert Kroemer